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664502—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 276

EARL S. WORSHAM, TRADING AS WORSHAM BROTHERS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (R. 34–46) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 2, 1945 (R. 46). A motion for a new trial was overruled on June 4, 1945 (R. 46). The petition for a writ of certiorari was filed on July 30, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether under the provisions of a standard form government construction contract the findings of a contracting officer are to be accorded finality, where such findings have been procured by the fraud and unconscionable conduct of the contractor.

STATEMENT

On November 23, 1935, petitioner entered into a contract with the United States, through the War Department, for the construction of barracks at Fort McClellan, Alabama. The work was to be commenced on or before December 3, 1935, and was to be completed on or before July 30, 1936; the contract called for lump sum payment of $320,500 (R. 4, 29).

Paragraph S–C3 of the specifications of the contract provided, *inter alia,* that:

> All organized labor, skilled and unskilled, when organized labor is desired and requested by the contractor, which is employed upon projects prosecuted under contract shall be supplied by the employment agencies designated by the United States Employment Service, from the membership of recognized unions * * *. In the event, however, that qualified workers are not made available from the membership of the unions within forty-eight hours (Sundays and holidays excepted) after a request therefor is filed by the contractor, and the employment agency has notified

the unions of the receipt of such request, such labor may be chosen by the contractor from other qualified workers, supplied by employment agencies designated by the United States Employment Service. (R. 24–25, 29–30).

During the course of the performance of this contract, petitioner addressed a number of requests to the constructing quartermaster for extensions of time to perform the work. These requests were based upon the alleged failure of the United States Employment Service to furnish petitioner a sufficient supply of qualified labor in accordance with Paragraph S–C3 of the specifications (R. 30–31). On July 24, 1936, Lt. Col. H. E. Pitz, the Acting Chief of the Construction Division of the Quartermaster General, on recommendation of the constructing quartermaster, extended petitioner's performance time by 120 days "due to insufficient supply of qualified labor available through the source of procurement stipulated in [petitioner's] contract" (R. 32, 35). This brought the completion date of the contract up to November 27, 1936, but due to further extension orders not here in issue, the completion date was thereafter again extended to April 7, 1937, on which date the United States accepted the project as completed (R. 32–33).

On September 9, 1938, petitioner brought suit in the Court of Claims (R. 1–4), seeking to re-

cover $75,000 as damages for the 120 days' delay alleged to have resulted from the failure of the United States to furnish him, in accordance with Paragraph S–C3 of the specifications, sufficient qualified labor.[1] The court below, after reviewing (Fdg. 4, R. 30–32) the facts and circumstances surrounding the issuance of the 120-day extension order, and the finding of fact contained therein, found that "as a matter of fact, there was never a shortage in the supply of qualified labor", that "more than a sufficient supply was promptly sent to [petitioner's] job by the United States Employment Service" and that petitioner accordingly "suffered no delay on account of a labor shortage" (R. 32). The court, after stating that a "careful review of all the evidence"[2] revealed that the compelling circumstance which led to the 120-day extension order and the finding of fact contained therein "was a piece of manufactured evidence"

[1] Petitioner also petitioned the court below to enter judgment against the United States for $2500, representing extra costs incurred for the installation of salt-glazed tile on wall and partition bases (R. 3–4, 34). The court below denied recovery of this amount (R. 42–43, 46), and petitioner does not seek review of that determination (Pet. 3).

[2] The instant case was originally argued before the court below on June 3, 1942. On October 5, 1942, the court ordered the cause remanded to its general docket to be reargued *ab initio* and re-referred it to a Commissioner "for the taking of further testimony on the extent of the delay due to [respondent's] failure to supply a sufficient amount of qualified labor and the damages to [petitioner] as a result thereof." The order further recited that the "parties may

which was "misleading, and did not state the true facts" (R. 37), dismissed the petition.[3]

ARGUMENT

Petitioner does not attack the correctness of the findings of fact of the court below that "there was never a shortage in the supply of qualified labor" available to him, that "more than a sufficient supply" of men requisitioned by him "was promptly sent to the job by the United States Employment Service," that petitioner "was not able to hire a large number of men which he had requisitioned," and that he consequently "suffered no delay on account of a labor shortage" (Fdg. 4, R. 32).[4]

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offer any testimony on these questions which may be relevant and competent. The competency thereof shall not be restricted by the fact that it may contradict, modify or explain the extension order issued by the contracting officer on July 24, 1936" (R. 28).

[3] Judge Whitaker delivered "the opinion of the court" in which Judge Littleton alone concurred (R. 34, 43); Judge Madden wrote a separate concurring opinion (R. 43–46) and Chief Justice Whaley wrote a dissenting opinion (R. 46). Judge Jones did not participate in the decision (R. 46).

[4] Indeed, such an attack is not now open in this Court. Findings of the Court of Claims are conclusive upon this Court unless error is assigned that there is a lack of substantial evidence to support the findings, and the evidence material to that assignment is included in the record. Act of May 22, 1939, 53 Stat. 752, 28 U. S. C. 288. Here petitioner does not, in his "Specification of Errors to Be Urged" (Pet. 3), challenge the correctness of the above-mentioned findings of the court below, and the record filed with this Court does not include any of the evidence necessary to resolve such an attack, had petitioner chosen to make it.

Petitioner's argument (Pet. 3) is confined to the alleged error of the court below in "disregarding the findings and conclusions of the Contracting Officer," granting petitioner a 120-day extension "due to insufficient supply of qualified labor available through the source of procurement stipulated in [petitioner's] contract" (R. 32). These findings of the contracting officer, petitioner contends (Pet. 3, 7–10), made in conformity with Article 9 of the government standard form construction contract,[5] are to be accorded finality under "a long line of decisions" of this Court and the Court of Claims.

We do not, of course, challenge the well settled rule that where parties to a contract have so agreed, the decisions of contracting officers on all or specified matters of dispute arising during the performance of the contract are final and conclusive, and will not, in the absence of fraud or of mistake so gross as to imply bad faith, be subject to the revisory powers of the courts. *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 701, 704; *United States* v. *Gleason*, 175 U. S. 588, 602;

[5] Article 9 of the contract provided that the contracting officer "shall ascertain the facts and extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal * * *" (R. 11).

Martinsburg & Potomac R. R. Co. v. *March,* 114 U. S. 549, 553; *Kihlberg* v. *United States,* 97 U. S. 398, 402. Not only will fraud avoid a contracting officer's decision, but it is settled that the invalidating fraud is not "limited to fraudulent conduct on the part of the umpire." Where an arbiter's decision, although rendered in "good faith", is shown to have been "brought about by the fraudulent conduct of one of the parties" to the contract, the courts properly may deny finality to that decision. *Forrest City Box Co.* v. *Sims,* 208 Fed. 109, 114 (C. C. A. 8); and see *Teal* v. *Bilby,* 123 U. S. 572, 579–580; Williston, *Contracts* (Rev. Ed., 1938), § 1929A. See also *United States* v. *Smith,* 256 U. S. 11; *Ripley* v. *United States,* 223 U. S. 695, and *Maurice L. Bein* v. *United States,* 101 C. Cls. 144, in which it was held that a contracting officer's decision may be disregarded because of arbitrariness amounting to bad faith.

The undisputed findings of fact of the court below (Fdg. 4, R. 30–32) make it clear that the finding of the contracting officer contained in the 120-day extension order was a result of petitioner's fraudulent and unconscionable conduct, and, for that reason, properly was not accorded finality by the court below.[6] On January 9, 1936,

[6] It is evident from the court's opinion (R. 39–42) and its order remanding the cause to its general docket after initial argument (R. 28; fn. 2, *supra*), that the court below exercised careful discretion before refusing to accord finality to the finding contained in the extension order.

some six months prior to the date of the 120-day extension order (July 24, 1936; R. 32, 35), petitioner instructed his superintendent, by letter, as follows:

> Do not fail to begin to ask for extension of time on everything you have an excuse for and and do not wait until later on in the job. Get on the good side of Ebeling so that he will grant us all the extensions we may need. (R. 30).

On March 18, 1936, petitioner again wrote his superintendent:

> One thing we must do is to get requisitions in, in writing, and to keep asking for extension of time. Set out in your letters that our overhead is tremendous due to their not furnishing sufficient numbers of workmen and write them a letter every few days. Do not fail to do this [sic]. We have gone on record from this office stating that we are going to enter a claim for this overhead but, confidentially, we do not believe the Government will allow us anything for any claim we may set up for this. However, if you keep your files built up properly, then we have a better chance. It will also help in getting the extension of time. (R. 30).

On July 15, 1936, the constructing quartermaster forwarded a number of petitioner's requests for extensions of time to the Quartermaster General, recommending a 120-day extension (R. 30–31).

Aware of the fact that there was no shortage of qualified labor, the constructing quartermaster made this recommendation "to give [petitioner] a break" (R. 41).[7] The office of the Quartermaster General thereupon advised the constructing quartermaster, by letter dated July 21, 1936, as follows:

> In the event that qualified workers other than members of organized labor were not available during the period of the need for such workers, the request of the contractor should be supported by a certificate from the Employment Agency designated by the United States Employment Service to the effect that qualified non-union labor was not available. (R. 31.)

Thereafter, on July 23, 1936, petitioner's superintendent procured the following letter, signed and sworn to by H. S. Kent, District Manager of the United States Employment Service at Anniston, Alabama:

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[7] The constructing quartermaster, Major Jabelonsky, testified in the court below that petitioner was "not delayed by labor whatever. There was more than an ample supply of labor at all times" (R. 40). When asked to state the facts concerning his recommendation to the Quartermaster General, Major Jabelonsky replied that petitioner suffered "considerable difficulty with the weather, materials, etc.," that petitioner's contract "doesn't permit an extension of time on account of weather conditions, and the only thing we could say was the labor. As a matter of fact, it wasn't labor at all. * * * It was due entirely to save the contractor from paying liquidated damages and help him along so to speak, to give the poor contractor a break all the way through" (R. 41).

> I hereby certify that qualified skilled labor was not available in sufficient numbers to fill the requisitions presented by Worsham Brothers, contractor for the construction of one Barracks Building at Fort McClellan, Alabama.
>
> Although this office made every endeavor to furnish qualified workers to this contractor, unnecessary delays were caused in furnishing many qualified workers because they were not available at the time requisitions were received from the contractor.
>
> In many instances, qualified workers requested did not report to the contractor within a reasonable length of time. The time that elapsed from receipt of requisitions until men reported was excessive. (R. 31.)

This letter, characterized by the court below as a "piece of manufactured evidence * * * misleading, and [not stating] * * * the true facts" (R. 37), was, the court found, "originally drafted by [petitioner's] superintendent and was copied by the District Manager of the Employment Service on the stationery of that service" (R. 31). A copy of this letter was then forwarded to petitioner by his superintendent, with the following letter of transmittal:

> After talking with Spear and explaining the situation to him, he agreed to leave it up to Kent. After chewing the rag awhile I finally got Kent to agree to it and I took

> him to town and a Notary Public and got it fixed up. I am enclosing a copy of the affidavit.
>
> It occurs to me that these affidavits or affidavit affords us valuable evidence should you elect to claim for damages against the Government. That is why I made the copy before turning the original over to the Major (the Constructing Quartermaster). * * * (R. 31–32).

On July 24, 1936, the constructing quartermaster forwarded to the Quartermaster General an order extending the time for the completion of the contract in question by 120 days (R. 32). This order was signed by Lt. Col. H. E. Pitz, Acting Chief, Construction Division (R. 32), who found the extension necessary "due to insufficient supply of qualified labor available through the source of procurement stipulated in [petitioner's] contract." Lt. Col. Pitz subsequently testified in the court below "that he had no knowledge of the facts, but relied upon the statements and recommendations of his subordinates and that 'normally the recommendation of the constructing quartermaster is the controlling factor in the case' " (R. 36). It is the finding embodied in Lt. Col. Pitz's order which petitioner urges should be accorded finality.

In light of the foregoing undisputed findings of fact of the court below, and the testimony taken before the Commissioners of that court, it is clear that the finding of fact contained in the 120-day

extension order was the result of petitioner's fraudulent and unconscionable conduct. Under the applicable rules of law, the court below accordingly properly refused to accord it any degree of finality.[8]

CONCLUSION

The decision below is correct, rests on the facts peculiar to this case, and represents no departure from the accepted rule. There is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

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SEPTEMBER 1945

[8] The conclusion below is also valid for an alternative reason set forth in the concurring opinion of Judge Madden. Pointing out that Paragraph S–C3 of the specifications did not apply to petitioner at all unless he "desired and requested" to use union labor, Judge Madden held that the specification may therefore not be made a basis for urging that the Government violated petitioner's contract, since there "is not a word [therein] which says or suggests that the Government guarantees an adequate supply of labor" (R. 44). See *York Engineering and Construction Company* v. *United States*, C. Cls. No. 45282, decided February 5, 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945